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No. 84-1747

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1984

CLEO F. SHOULTZ,

Petitioner,

vs.

MONFORT OF COLORADO, INC.,
a Delaware Corporation;
KENNETH W. MONFORT, AND
SAMUEL D. ADDOMS,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the right to petition for redress of grievances provided in the First Amendment provides absolute immunity to persons who have maliciously communicated false and defamatory statements about a federal meat inspector and participated in a conspiracy to have him removed from his assigned place of duty, prevent him from performing his duties at such place, or to molest, interrupt or hinder him in the discharge of his official duties within the meaning of 42 United States Code Section 1985(1)?

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STATEMENT OF THE CASE

After re-review of the record Petitioner adheres to his Statement of the case.

On July 1, 1985, this Court entered an Order inviting the Solicitor General to file a brief expressing the views of the United States. On Jan. 10, 1986, the Solicitor General filed such a brief and mailed copies thereof to Counsel (hereafter, the Amicus Brief.)

(Errata Note: There is one printing error in Appendix C to the Petition, The Amended Complaint. This is in Para. 19, which appears on page 46. The printed copy shows 42 U.S.C. Section 1985(2), but the Amended Complaint filed with the District Court shows this as 42 U.S.C. Section 1985(1)).

REASONS FOR GRANTING THE WRIT

1. FEDERAL OFFICIALS WHO ARE PROPERLY PERFORMING THEIR DUTIES ARE ENTITLED TO, AND SHOULD HAVE THE PROTECTION AFFORDED THEM BY SEC 1985(1) AGAINST THOSE WHO CONSPIRE TO INTERFERE WITH THE PERFORMANCE OF THOSE DUTIES.

Both the Monfort defendants and the Amicus have misstated the issue, ignored salient facts in the Complaint, and have responded as if only two specific communications by the Monfort defendants to government officials were the basis of this 1985(1) action.

Paragraph 9 through 12 of the Complaint, which are quoted verbatium in Appendix C to Mr. Shoultz' Petition at pages 43-44, list a number of other actions of the Monfort defendants, which were taken in furtherance of the conspiracy whose purpose was to have Mr. Shoultz removed from his assigned place of duty at the Monfort plant, to prevent him from performing his duties at such place, or to molest, interrupt or hinder him in the performance of such duties.

Paragraph 17 of the Complaint quotes from a written communication by Monfort defendant Addoms to Mr. Shoultz's superiors stating that:

> "Plaintiff would be prevented from entering the Monfort plant under any circumstances by security personnel." (Petition, p. 45.)

It is difficult to understand how this assertion of proposed use of force against a Federal official can be deemed worthy of absolute immunity under the Petition Clause of the First Amendment.

Defamation is not the primary issue in this case. Indeed, a major vice of the decision below is that it provided absolute First Amendment immunity for all of the acts alleged in paragraphs 9 through 12 of the Complaint.

Even if the two specific communications were the only acts alleged with any detail, it must be remembered that this Complaint was dismissed prior to any discovery. Under any theory of notice pleading it was sufficient to at least permit discovery. After discovery, the Monfort defendants still have available a possible Summary Judgment remedy under Rule 56, F R Civ P.

The test of "malice" in this connection cannot be merely the truth or falsity of the words spoken. Rather actions or speech to be deemed malicious must be judged in the context of the entire episode. The variety of situations which would justify the use of this term in a civil law context was recently noted by this Court (Smith v. Wade, 461 U S 30, 39, n. 8 (1983).

Nothing contained in any discussion of malice known to counsel, even in the context of a communication, limits its application to a false communication. Truth may be communicated maliciously for an illegal purpose. As this court noted ". . . we discern no reason why a

person whose federally guaranteed rights have been violated should be granted a more restrictive remedy than a person asserting an ordinary tort cause of action." (Smith v. Wade, supra, at 461 US 48-49).

Acts, such as truthful statements, which are lawful in themselves may lose that character when they become elements of an unlawful scheme (see Continental Ore Co. v. Union Carbide, 370 US 690, 707 (1962)).

Since Mr. Shoultz was a non probationary employee of the federal civil service, statutory provisions guaranteed his employment in the absence of sufficient cause for his discharge (Board of Regents v. Roth, 408 US 564, 576-578(1972). Thus he had a "property interest" in that employment (Arnett v. Kennedy, 416 US 134,155 (1974); 416 US 165-166 (Mr. Justice Powell concurring); 416 US 177-178 (Mr. Justice White concurring and dissenting on other issues).

It is hornbook law that a conspiracy may be established by the use of unlawful means to achieve a lawful result, or of lawful means with intent of achieving an unlawful result. Both are involved here. The first prong was alleged by the allegation of the communication that if Mr. Shoultz was returned to his duties at the Monfort plant he would be physically barred from entry. The second prong was alleged by the allegation of a comunication (lawful in itself) demanding that Mr. Shoultz be removed as an inspector from the Monfort plant. Malice here may be shown by proof that the reason for the request was to prevent proper enforcement of USDA regulations.

Such proof, or lack of its availability, must await the outcome of discovery. It is not a proper basis for dismissal for failure to state a claim upon which relief may be granted.

2. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE ISSUE OF ABSOLUTE VERSUS QUALIFIED IMMUNITY UPON WHICH THE CIRCUITS AND DISTRICT COURTS HAVE EXPRESSED CONFLICTING VIEWS AND DECISIONS.

In a section 1983 case, the Eighth Circuit found absolute immunity, under the petition for redress of grievances clause of the first Amendment for non-governmental defendants, following Stern v. United States Gypsum, Inc. 547 F2d 1329, 1342-1346 (7th Cir 1977). (Gorman Towers, Inc. v. Bogoslavsky, 626 F2d, 614-615 (8th Cir 1980).

Mr. Shoultz in his petition noted the district court's decision in Smith v. McDonald, 562 F Supp 829 (MD NC 1983) which held the First Amendment to be an absolute bar to plaintiff's 1985 claim, but which also held that a finding of malice would defeat such a defense to a common law libel claim. Only the latter holding was appealed and affirmed. (Smith v. McDonald, 737 F2d 427 (4th Cir 1984)). In so holding the Fourth Circuit relied upon this Court's decision in White v. Nicholls, 44 US (3How) 266 (1845), and Windsor v. The Tennessean, 719 F2d 155 (6th Cir 1983). The latter was a case brought under 1985(1). The Fourth Circuit noted its earlier decision in Bradley v. Computer Sciences Corp., 643 F2d 1029 (4th Cir 1981), cert den 454 US 940 (1981) (which was one of the cases cited below in support of its absolute immunity holding) and said that in Bradley:

> ". . . we held that the petition clause affords a qualified privilege." (At 737 F2d 429).

From its discussion of White v. Nicholls, it seems apparent that had the plaintiff in Smith v. McDonald appealed the ruling against him on his 1985(1) claim, the Fourth Circuit would have held the defendant entitled only to qualified immunity, which could have been defeated by proof of malice (Id). The Fourth Circuit also noted the deccision of the Eight in Gorman Towers v. Bogoslavsky, supra, in support of a claim of absolute privilege and said "We are not persuaded by these authorities." (Id).

This Court has held that in the enactment of the various civil rights statutes, the Congress did not intend to abolish or change the traditional immunities, some of which were absolute, while others

were qualified. (Owen v. City of Independence, Mo., 445 US 622, 638 (1980)). Thus, it must be assumed that the Congress in enacting the statute now known as sec 1985(1) also included only the qualified immunity set forth in White v. Nicholls.

Subsequent to the filing of the instant Petition this Court affirmed the decision of the Fourth Circuit in Smith v. McDonald, supra, in the context of an action for libel. Both the Chief Justice speaking for the majority and Mr. Justice Brennan in concurrence expressed the view that the Petition clause provides only qualified immunity:

> "Nor do the Court's decisions interpreting the Petition Clause in contexts other that defamation indicate that the right to petition is absolute. For example, filing a complaint in court is a form of petitioning activity; but 'baseless litigation is not immunized by the First Amendment right to petition. . . . To accept petitioner's claim of absolute immunity would elevate the Petition Clause to special First Amendment status. The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedom to speak, publish, and assemble . . . These First Amendment rights are inseparable . . . and there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions."

Smith v. McDonald, _____ US _____, 54 USLW 4789, 4791 (announced June 19, 1985 in a decision by Mr. Chief Justice Burger). The same thought was expressed by Mr. Justice Brennan, concurring as:

> "There is no persuasive reason for according greater or lesser protection to expression on matters of public importance depending on whether the expression consists of speaking to neighbors across the backyard fence, publishing an editorial in the local newspaper, or sending a let-

> ter to the President of the United States. It necessarily follows that expression falling within the scope of the Petition Clause, while fully protected by the actual malice standard set forth in New York Times Co. v. Sullivan, is not shielded by an absolute privilege."

(at 53 USLW 4793).

The Bench and Bar should be given specific direction by this Court, that the Petition Clause provides only qualified rather than absolute immunity for 1985(1) actions. Three recent District Court decisions illustrate the need for such definite guidance, (Giles v. Alley, 591 F. Supp 181, 187 (MD Ala 1985) (qualified immunity); Bodenmiller v. Stanchfield, 557 F Supp 857, 861 (ED NY 1983) (immunity without characterization as absolute or qualified but citing both Stern and Bradley for its position); and Chocallo v. Bureau of Hearings and Appeals, SSA, 548 F Supp 1349, 1360 (ED Pa 1982) (absolute immunity).

The attempt of the Amicus Brief to denigrate the importance of 1985(1) is singularly inappropos. Thousands of low to mid level employees of the United States charged with the enforcement of legislation and protection of the integrity of procurement are faced with the same kinds of pressures here exerted upon Mr. Shoultz by agents of the activities they are required to oversee. If malicious complaints about their performance are to be granted absolute immunity under the Petition Clause it is small wonder that 1985(1) is an all too seldom used statute.

Honest and faithful employees in the federal service deserve its protection in the proper performance of their duty. In each case they would still have to carry the heavy burden of proof of actual malice. When this can be demonstrated, a 1985(1) action should be allowed to go forward as a deterrence against those who would attempt to conspire to hinder or prevent the performance of their duties. If force or threat thereof is a prequisite, it was sufficiently alleged in the Complaint filed herein.

A grant of Certiorari, in a case such as this, involving an important issue of constitutional law need not depend upon whether the plaintiff may ultimately prevail on the merits of his case (e.g., Kush v. Rutledge, 460 US 719, 723, n. 5 (1983)). In Kush Certiorari was granted to settle a split between the circuits on the meaning of 1985(2), but did not touch on the instant question of the nature of the First Amendment immunity vis a vis 1981(1).

CONCLUSION

This issue can and should be laid to rest by this Court. It can be done with great judicial economy by summary disposition, reversing the decision below, with a statement that the doctrine announced in Smith v. McDonald, supra, is equally applicable to actions brought under 1985(1).

The writ should be granted.

Respectfully submitted,

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